IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA KANIA and	:	**CIVIL ACTION**
HARRY KANIA	:	
	:	
v.	:	
	:	
SBARRO, INC., d/b/a	:	
SBARRO ITALIAN EATERY	:	**NO. 97-6863**

MEMORANDUM ORDER

Presently before the court is defendant's motion for summary judgment in this personal injury action.

From the evidence as uncontroverted or taken in a light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff Barbara Kania was a luncheon customer at defendant's restaurant at Noon on a weekday. She slipped on a piece of lettuce while walking near the food buffet, twisting and injuring her ankle. She did not notice the lettuce on the floor before she slipped. She did not observe any Sbarro employees near the food buffet for the five to ten minutes she was present before she slipped. After she slipped, she noticed that the lettuce on the floor was slightly brown. Rey Caballero, defendant's general manager, did not observe any employee or customer spill or drop food on the floor on the date in question. Mr. Caballero's duties include checking the buffet area every five to ten minutes to replenish the food and to inspect the floor for spills or debris. Mr. Caballero did not observe any lettuce or any other kind of food or debris on the floor at any time on the day of the accident. Mr. Caballero, however,

acknowledged to Mrs. Kania after she slipped that the restaurant was shorthanded on that day.

In the opinion of plaintiffs' expert, the floor at defendant's restaurant was unreasonably dangerous and conducive to slips because of the type of surface used and the absence of mats.

Defendant argues that there is no triable issue of fact because there is no evidence that any Sbarro employee was responsible for dropping the lettuce on the floor or had actual or constructive knowledge of its presence.

Pennsylvania has adopted §§ 343 and 344 of the Restatement (Second) of Torts. See Schon v. Scranton-Springbrook Water Svc. Co., 112 A.2d 89, 91 (Pa. 1955) (adopting § 343); Moran v. Valley Forge Drive-In Theater, Inc., 246 A.2d 875, 878 (Pa. 1968) (adopting § 344).

Section 343 provides that:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition upon the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and © fails to exercise reasonable care to protect them against the danger.

Possessors of land owe invitees not only a duty to disclose dangerous conditions of which the possessor is aware but also a duty "to exercise reasonable affirmative care" to discover

dangerous conditions and either rectify the condition or warn invitees of the danger. See Restatement (Second) of Torts, § 343, cmt. b.

Section 344 provides that:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

A possessor of land is generally not obligated to exercise such care until he knows or should know of the third party's actions, however, he "may know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual." See § 344, cmt. f.

A possessor of the land is also liable, of course, for a harmful condition which he or his employees created. See Swift v. Northeastern Hosp. of Phila., 690 A.2d 719, 722 (Pa. Super.), appeal denied, 701 A.2d 577 (Pa. 1977); Moultrey v. Great Atlantic & Pacific Tea Co., 422 A.2d 593, 598 (Pa. Super. 1980).

Defendant relies on Moultrey and Myers v. Penn Traffic Co., 606 A.2d 926 (Pa. Super. 1992), appeal denied, 620 A.2d 491 (Pa. 1993) to argue that plaintiffs cannot sustain their claims

because there is no evidence as to how the lettuce got on the floor, how long it was on the floor or that food was spilled on the floor often enough to constitute a frequent, recurring condition. Defendant's reliance is misplaced. In Myers, the Superior Court declined to consider whether § 344 of the Restatement applied. See Myers, 606 A.2d at 932-33 (Wieand, J., dissenting). In Moultrey, the plaintiff failed to offer any evidence to show that the cherry on which she slipped had been on the floor for a sufficient period of time that the defendant could be charged with knowledge of its presence.

In the instant case, one could reasonably infer that defendant knew of the likelihood food would be dropped on its floor from evidence that its manager was required to inspect the floor for spills every five to ten minutes. One could reasonably infer that the floor was not so inspected from Mrs. Kania's testimony that she saw no Sbarro employees in the buffet area for five to ten minutes before the accident and Mr. Caballero's admission that the restaurant was shorthanded on the day of the accident. See Fed. R. Evid. 801(d)(2)(D). One could also reasonably infer from Mrs. Kania's testimony that the lettuce was slightly brown in color that it had been on the floor for a sufficient period of time that defendant reasonably should have discovered it. See David v. Pueblo Supermarket of St. Thomas, 740 F.2d 230, 236 (3d Cir. 1984).

Also, if the opinion of plaintiffs' expert is credited, one could reasonably find that defendant itself created a

dangerous condition by utilizing a slippery surface without matting for a floor onto which it was reasonably foreseeable food particles and other slippery substances would fall.

ACCORDINGLY, this day of November, 1998, upon consideration of the defendant's Motion for Summary Judgment (Doc. #6) and plaintiffs' response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

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JAY C. WALDMAN, J.